

STATE OF MICHIGAN
COURT OF APPEALS

RENATE DE ZACKS, Personal Representative of
the Estate of NAUM ZACKS, Deceased,

UNPUBLISHED
July 28, 2005

Plaintiff-Appellant,

v

TENDERCARE, INC. and WHISPERING WAY
CARE SERVICES, INC.,

No. 254468
Ingham Circuit Court
LC No. 03-001400-nh

Defendants-Appellees.

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals on leave granted an order granting summary disposition in favor of defendants under MCR 2.116(C)(8).¹ The trial court found that plaintiff's claims sounded in medical malpractice rather than negligence and that plaintiff had failed to meet the procedural requirements for a medical malpractice claim pursuant to MCL 600.2912. This case arises from the death of plaintiff's husband while a patient at defendant Tendercare's nursing home under the supervision of staff supplied by defendant Whispering Way Care Services (Whispering Way). We affirm.

While plaintiff's decedent was a patient at Tendercare, Georgia Shaft, R.N. was a supervisor responsible for formulating his care plan. Plaintiff claimed Shaft had several felony

¹ Summary disposition on the ground that the nature of a claim is medical malpractice rather than negligence, and that the claim is barred by the statute of limitations, is properly granted under MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). However, a grant of summary disposition under the wrong subrule will not preclude review by this Court under the correct subrule. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; ___ NW2d ___ (2005). When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(7), we consider any submitted documentary evidence and accept as true the allegations in the complaint unless the allegations are contradicted by the documentary evidence. *Bryant, supra* at 419, citing *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

convictions that prohibited her from working in a supervisory position at any nursing home facility. Plaintiff further alleged that the care provided to the decedent was inadequate, that there were medication and diet errors, that he fell and was injured, that injuries were untreated, and that there were times when he was inappropriately groomed and dressed. Also, plaintiff alleged that in compliance with the care plan formulated by Shafts, plaintiff's decedent was given only basic care, rather than the more intensive care required for his dementia, end-stage renal disease, and coronary artery disease. On August 15, 2000, the decedent went into cardiac arrest and died. Plaintiff claimed that he was on "full code" status, which required prompt medical treatment in case of a cardiac event. Plaintiff alleged that no one at Tendercare attempted to revive him, nor was any call made to emergency services.

Plaintiff filed a complaint alleging, among other claims,² that Tendercare was negligent in failing to provide adequate diagnosis and care at the time plaintiff's decedent went into cardiac arrest and negligent in failing to provide adequate care generally, which contributed to his poor health and death. Plaintiff further alleged that Tendercare was negligent in failing to screen its employees and in placing a temporary contract employee in charge of the care of sixty to seventy patients on the night plaintiff's decedent died. Plaintiff also alleged that Tendercare was negligent in failing to advise its employees of the code status of its patients, in placing Shaft in a supervisory position, and in failing to adequately train its employees. Plaintiff alleged that Whispering Way was negligent in failing to screen, train, and supervise its employees.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that the allegations in plaintiff's complaint were all related to medical malpractice because they arose in the context of defendant's professional relationship with the decedent. Defendants argued that the claims should have been dismissed because plaintiff failed to comply with the procedural requirements for medical malpractice claims. See MCL 600.2912. Contrary to plaintiff's argument that the claims were for ordinary negligence, involved issues that were readily understandable by a jury, and did not require expert testimony, the trial court determined that plaintiff's claims involved the "administration of cardiopulmonary resuscitation, resident treatment, [and] nursing staff supervision" and that the claim sounded in medical malpractice.

² Plaintiff's claim based on the patients' rights act is not briefed on appeal. It is therefore considered abandoned. *Etefia v Credit Technologies, Inc.*, 245 Mich App 466, 471; 628 NW2d 577 (2001). Plaintiff cites no authority for her argument that the allegations comprising her claim for intentional infliction of emotion distress should not have been dismissed because they were properly pleaded. A party may not simply announce a position and leave it to this Court to discover the basis for his claims and search for authority to sustain his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, this argument will not be addressed. Similarly, we decline to address arguments regarding premises liability, federal preemption, and separation of powers, which have been presented for the first time on appeal. These issues are not properly preserved. "When a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below." *Gross v Gen Motors Corp.*, 448 Mich 147, 161-162, n 8; 528 NW2d 707 (1995). Plaintiff may not raise new grounds on appeal after being unsuccessful on the ground presented at trial. *Three Lakes Ass'n v Whiting*, 75 Mich App 564, 581; 255 NW2d 686 (1977).

Defendants' summary disposition motion was granted. We granted plaintiff's application for a delayed appeal. A trial court's decision to grant summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

First, plaintiff argues that her claim under Michigan's Consumer Protection Act, MCL 445.901, was colorable because it was not brought against a physician, but a commercial medical establishment, which had allegedly made certain false representations to plaintiff as an inducement to place the decedent in its facility. This was properly dismissed because it did not involve "allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice." *Nelson v Ho*, 222 Mich App 74, 83; 564 NW2d 482 (1997). Rather, it involved "[a]llegations that concern misconduct in the actual performance of medical services or the actual practice of medicine" which are improper under the MCPA. *Tipton v William Beaumont Hosp*, ___ Mich App ___, ___; ___ NW2d ___ (2005), slip op at 4.

Regarding plaintiff's remaining argument that this was a claim for ordinary negligence, not medical malpractice, the first issue in a medical malpractice determination is whether the suit is being brought against a party capable of malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 420; 684 NW2d 864 (2004). That Tendercare is capable of malpractice is undisputed. Second, the claim must sound in malpractice:

A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "within the course of a professional relationship." *Dorris [v Detroit Osteopathic Hosp Corp]*, 460 Mich 26, 45; 594 NW2d 455 (1999).] Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id.* at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id.* Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. [*Bryant, supra* at 422.]

Plaintiff asserts that because care was provided in part by Shaft – a supervisor employed by Tendercare who was working under a restricted license that did not allow her to serve in a supervisory capacity – there was no professional relationship. However,

A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or *the agents or employees of a licensed health care facility*, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff. [*Bryant, supra* at 422.]

Because plaintiff filed suit against Tendercare and Whispering Way, and because Shaft was an employee of Tendercare, Shaft's licensing status was irrelevant to whether Tendercare's relationship with the decedent was a professional one.

After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Bryant, supra* at 423.]

Plaintiff's complaint alleged that the staff at Tendercare made frequent diet and medication errors, that on several occasions the decedent appeared for dialysis inadequately dressed for the weather and with unchanged diapers, and that an inexperienced nurse was placed in charge of the decedent and sixty to seventy other patients on the night of his death. We find that expert medical testimony is required to determine the standard of care. Specifically, whether the charge nurse was adequately experienced or whether he was caring for too many patients is a medical issue requiring expert testimony on the standard of care for the training of nursing home staff and the supervision of nursing home patients. Similarly, alleged diet and medication errors would also require expert testimony. Hence, to the extent the claim was based on these allegations, it was properly dismissed for failure to comply with the procedural requirements of a medical malpractice claim.

Plaintiff also alleged Georgia Shaft had multiple felony convictions that made her ineligible to serve in a supervisory capacity at any nursing home and that Shaft was nevertheless in charge of developing the decedent's care plan. Plaintiff further alleged that defendant's employment of Shaft caused his injuries through neglect. Although plaintiff did not plead a specific statutory violation, she nevertheless alleged facts that, if taken as true, were sufficient to establish breach of defendant Tendercare's duty of care. MCL 333.21796 requires a nursing home administrator and licensee to ensure that all licensed employees are properly licensed.

Violation of a penal statute, which does not provide for civil liability, creates a prima facie showing of negligence from which a jury may infer negligence if the plaintiff is within the class of persons intended to be protected by the statute, violation of the statute is the proximate cause of the plaintiff's injuries, *Gould v Atwell*, 205 Mich App 154, 158; 517 NW2d 283 (1994), and "the statute is intended to protect against the result of the violation," *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986).

Once . . . the court determines that the statute is applicable to the facts in the case before it, liability still does not attach unless the finder of fact determines that the violation of the statute is the proximate cause of the injury. [*Zeni v Anderson*, 397 Mich 117, 138-139; 243 NW2d 270 (1976)(citations omitted).]

See also, *Klanseck, supra* at 90. Thus, assuming for the sake of argument that the court determined as a matter of law that the jury *could find* a causal connection between the violation of the licensing requirements and the decedent's injuries, plaintiff was still required to establish that defendant's negligent employment of an improperly licensed nurse *was* the cause of the decedent's injuries. *Id.* The gravamen of plaintiff's claims regarding Shaft was that she created

a care plan that provided basic care rather than the more intensive care that plaintiff alleged was required, and that Shaft's supervision of care resulted in neglect, injury, and a deterioration of the decedent's condition. Expert medical testimony would be required both to establish whether the decedent indeed required more intensive care and whether Shaft's supervision was a cause of the his deterioration and ultimate death. Because of the need for expert testimony on the causation element, this claim sounded in medical malpractice and not ordinary negligence. See *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986) (expert testimony is required to establish the standard of conduct, breach of the standard, and causation in medical malpractice cases). Therefore, this claim was properly dismissed for failure to comply with the requirements for a medical malpractice claim.

Finally, plaintiff alleged that Tendercare breached its duty by failing to inform the charge nurse of the decedent's code status, which ultimately led to his death because the nurse made no resuscitation efforts when he went into cardiac arrest. Although expert testimony would not be needed to establish breach of defendant's duty to inform its employees of the code status of the patients under their care, it would be required to establish whether it was more likely than not that the decedent would have survived had there been medical intervention.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh